UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-10336-RGS
COURT OF APPEALS NO. 02-1121

PAUL L. DEMARIA

v.

PAUL M. VERDINI

REPORT TO THE COURT OF APPEALS
AFTER REMAND FOR EXPLANATION

March 16, 2004

STEARNS, D.J.

The court submits the following memorandum of explanation in response to the Court of Appeals' order of March 10, 2004.

In attempting to frame a certificate of appealability in this case, my concern arose from the fact that the petitioner had been misled by (then) technically correct, but untested advice regarding the proper disposition of his "mixed petition" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Consistent with Rose v. Lundy, 455 U.S. 509 (1982), the Magistrate Judge, with appropriate cautions, had counseled petitioner to either amend his federal petition by deleting the unexhausted claims or, in the alternative, to dismiss the federal petition and return to state court to pursue exhaustion. After an ineffectual attempt at an amendment, the petitioner elected to pursue his state remedies. Consequently, on October 13, 2000, the petition was dismissed without prejudice. Relying principally on the Second Circuit's interpretation of the phrase "or other collateral review"

in AEDPA § 2244(d)(2), both the Magistrate Judge and I (and the petitioner) believed that the period during which the federal petition had been pending would be tolled under the one-year limitation period of AEDPA § 2244(d)(1), and that a perfected petition would be deemed timely if filed within one year of the date on which petitioner's state conviction became final (May 23, 1999), excluding the period during which the pendency of the federal petition and any subsequent Rule 30 motion acted to toll § 2244(d)(1). These assumptions proved wrong when, some nine months after the dismissal, the Supreme Court in Duncan v. Walker, 533 U.S. 167 (2001), held that "an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)," and therefore "did not toll the limitation period . . . ." Id. at 181-182.

Having invited petitioner down this cul-de-sac, the court seized on Justice Steven's suggestion in Duncan that equitable tolling was an appropriate remedy for the "overlooked" class of petitioners "whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." Id. at 184. See also Delaney v. Matesanz, 264 F.3d 7, 14 & nn. 4, 5 (1st Cir. 2001).

In attempting to frame the issue for appeal, the court (in admittedly impenetrable fashion), sought to credit petitioner with the 334 days that his federal habeas petition had been pending prior to the voluntary dismissal. The ruling was intended to restore to the petitioner the 92 days between the filing of his federal petition on February 22, 2000, and the expiration date of AEDPA's limitation period on May 24, 2000, in order to permit

petitioner to seek Rule 30 relief with respect to the unexhausted claims, and if unsuccessful, to return to federal court with a perfected petition before the 92 days (less any period during which the Rule 30 motion was pending) expired.

Because this solution appeared to conflict with dicta in Justice O'Connor's opinion in Duncan, that tolling the AEDPA limitation period during the pendency of an application for federal relief "would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions," 533 U.S. at 180 (albeit tempered by her refusal to address Justice Stevens' equitable tolling suggestion), I perhaps overreacted in certifying an appeal, rather than simply proceeding on the courage of my own convictions. Although in the fog of time, I cannot be entirely certain as to why I denied the motion to vacate the dismissal, it was likely with this last consideration in mind. It being clear from the Court of Appeals order of February 6, 2003, that I had certified the wrong question for appeal, my recommendation is as follows: (1) that the Court of Appeals dismiss petitioner's appeal and remand the case to the district court; (2) that on remand, the district court reconsider its December 17, 2001 order and restore the petition to the docket; and (3) that the district court grant petitioner a reasonable period of time to demonstrate that he had undertaken a proper and timely application for further state review of his conviction pursuant to Rule 30 in reliance on the erroneous judicial advice that he had received and that his petition therefore deserves to be considered on its merits.

RESPECTFULLY SUBMITTED,

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE